IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

FOODBRANDS SUPPLY CHAIN SERVICES, INC., f/k/a NATIONAL SERVICES CENTER, INC.,	)	
Plaintiff,	)	**CIVIL ACTION**
v.	)	**No. 02-2504-CM**
TERRACON, INC., et al.,	)	
Defendants.	)	

MEMORANDUM AND ORDER

This matter comes before the court on plaintiff Foodbrands Supply Chain Services, Inc.'s (Foodbrands) Motion for Reconsideration (Doc. 94). Plaintiff has requested that the court reconsider its previous ruling that Foodbrands' claims against defendants George J. Shaw Construction, Company, Inc. (Shaw) and Harris Construction Company, Inc. (Harris) be arbitrated in light of defendant Terracon, Inc.'s (Terracon) designation of comparative fault.

I. Procedural Background

Foodbrands brought this action on September 30, 2002, against Terracon alleging breach of contract, breach of express warranty, negligence, and negligent misrepresentation. Foodbrands filed a third amended complaint on May 14, 2003, adding defendants Shaw and Harris and claiming that Shaw and Harris each breached respective contracts they had with Foodbrands. On December 8, 2003, the court granted Shaw and Harris' joint motion to compel arbitration of Foodbrands' claims against them. That

same day, Terracon filed its designation of comparative fault, designating Harris and Shaw as non-parties whose fault should be compared.

II. Standard for Motion to Reconsider

Whether to grant or deny a motion for reconsideration is committed to the court's discretion. *Brown v. Presbyterian Healthcare Servs.*, 101 F.3d 1324, 1332 (10th Cir. 1996); *Hancock v. City of Okla. City*, 857 F.2d 1394, 1395 (10th Cir. 1988). In exercising that discretion, courts have recognized three major grounds justifying reconsideration: (1) an intervening change in controlling law; (2) availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice. *See Major v. Benton*, 647 F.2d 110, 112 (10th Cir. 1981); *Burnett v. W. Res., Inc.*, 929 F. Supp. 1349, 1360 (D. Kan. 1996); *Marx v. Schnuck Mkts., Inc.*, 869 F. Supp. 895, 897 (D. Kan. 1994). "Appropriate circumstances for a motion to reconsider are where the court has obviously misapprehended a party's position or the facts or the law, or the court has mistakenly decided issues outside of those the parties presented for determination. A party's failure to present its strongest case in the first instance does not entitle it to a second chance in the form of a motion to reconsider." *Burnett*, 929 F. Supp. at 1360 (citing *Anderson v. United Auto Workers*, 738 F. Supp. 441, 442 (D. Kan. 1990); *Renfro v. City of Emporia, Kan.*, 732 F. Supp. 1116, 1117 (D. Kan. 1990)). Moreover,

"[a] motion to reconsider is not a second chance for the losing party to make his strongest case or to dress up arguments that previously failed." *Flake v. Hoskins*, 55 F. Supp. 2d 1196, 1203-04 (D. Kan. 1999).

III. Discussion

Foodbrands has requested that, in light of Terracon's recent pleading, the court clarify that the designation of Shaw and Harris as parties for the purposes of comparison of fault does not trigger the

application of the one trial rule or, in the alternative, that the court modify its previous ruling, remove the current stay of the suit against Shaw and Harris, and order that those claims also be resolved in the instant action with Terracon. However, Foodbrands has not satisfied any of the three grounds which might justify relief and cause the court to alter its December 8, 2003, Order compelling arbitration of Foodbrands' claims against Shaw and Harris.

In its motion for reconsideration, Foodbrands contends that, in the December 8, 2003, Order, the court concluded that the one trial rule did not require that Foodbrands' contract claims against Shaw and Harris be tried as part of Foodbrands' action against Terracon. Foodbrands argues that, in reaching that conclusion, the court noted that Terracon had not identified either Shaw or Harris as being parties against which Terracon would compare fault. Foodbrands claims that Terracon's subsequent designation of Shaw and Harris for comparative fault comparison casts some doubt over the court's conclusion regarding the one trial rule.

The court finds that Terracon's designation of Shaw and Harris as "non-parties whose fault should be compared" pursuant to Kan. Stat. Ann. § 60-258a does not alter the court's holding in its December 8, 2003, Order. First, as the court noted in its December 8, 2003, Order, Foodbrands has alleged breach of contract and tort claims against Terracon, but only breach of contract claims against Harris and Shaw. Second, Foodbrands has requested only economic damages against Harris and Shaw. Third, while Foodbrands may contend that Harris and Shaw acted negligently in performing their contractual duties, such claims arise out of the parties' contractual relationships and do not constitute separate tort claims. Fourth, Kansas courts interpreting § 60-258a have held that, where multiple parties could be at fault for tort claims and a plaintiff chooses to proceed against only one party on the tort claims, that party will be responsible

only for its proportionate share of damages. *Haysville U.S.D. No. 261 v. GAF Corp., et al.*, 233 Kan. 635, 640-41, 666 P.2d 192 (1983) (citing *Ellis v. Union Pacific R.R. Co.*, 231 Kan. 182, 643 P.2d 158 (1982)). Finally, Foodbrands is prohibited from applying § 60-258a to its breach of contract claims against Harris and Shaw because comparative or contributory negligence principles do not apply to breach of contract cases where the plaintiff has requested economic damages as its sole remedy. *See Haysville*, 233 Kan. at 643-645, 666 P.2d 192; *Broce-O'Dell Concrete Prods., Inc. v. Mel Jarvis Constr. Co.*, 6 Kan. App. 2d 757, 634 P.2d 1142 (1981).

Terracon's designation of Harris and Shaw as "non-parties whose fault should be compared" pursuant to Kan. Stat. Ann. § 60-258a is simply a designation of comparative fault. Therefore, in Foodbrands' negligence claim(s) against Terracon, Terracon will be held responsible only for its proportionate share of any damages for the negligence claim (as compared to any fault of Shaw and Harris), as the only party against whom tort claims have been brought. The court finds that Terracon's comparative fault designation does not affect any of the rulings in the court's December 8, 2003, Order, in the absence of any separate tort claims against Shaw and Harris.

IT IS THEREFORE ORDERED that Foodbrands' Motion to Reconsider (Doc. 94) is denied.

Dated this 4th day of June 2004, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge